

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF WASHINGTON
4

5 KATE ROBECK,

6 Plaintiff,

7
8 v.

9 CAROLYN W. COLVIN,
10 Commissioner of Social Security,

11 Defendant.
12

No. 1:14-CV-03148-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

13 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF
14 No. 15, 21. Attorney D. James Tree represents Kate Robeck (Plaintiff); Special
15 Assistant United States Attorney Franco L. Becia represents the Commissioner of
16 Social Security (Defendant). The parties have consented to proceed before a
17 magistrate judge. ECF No. 9. After reviewing the administrative record and the
18 briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for
19 Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and
20 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
21 42 U.S.C. § 405(g).
22

JURISDICTION

23 Plaintiff filed applications for Supplemental Security Income (SSI) and
24 Disability Insurance Benefits (DIB) on January 10, 2010,¹ alleging disability since
25 November 1, 2008, due to bipolar II with mania, depression, and post-traumatic
26

27 ¹The Disability Report from the Field Office notes a protective filing date of
28 January 10, 2010. Tr. 262; *See* POMS GN 204.010.

1 stress disorder (PTSD). Tr. 231-236, 265. The applications were denied initially
2 and upon reconsideration. Tr. 140-143, 145-152, 159-180. Administrative Law
3 Judge (ALJ) Virginia M. Robinson held a hearing on January 14, 2013, at which
4 Plaintiff, represented by counsel, and vocational expert, Trevor Duncan, testified.
5 Tr. 42-83. The ALJ issued an unfavorable decision on February 1, 2013. Tr. 25-
6 35. The Appeals Council denied review on August 8, 2014. Tr. 1-6. The ALJ's
7 February 1, 2013, decision became the final decision of the Commissioner, which
8 is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this
9 action for judicial review on October 8, 2014. ECF No. 1, 4.

10 **STATEMENT OF FACTS**

11 The facts of the case are set forth in the administrative hearing transcript, the
12 ALJ's decision, and the briefs of the parties. They are only briefly summarized
13 here.

14 Plaintiff was twenty-seven years old at the alleged date of onset. Tr. 231.
15 Plaintiff completed the twelfth grade in 1999. Tr. 267. She has past work as a
16 cashier, busser, cocktail server, customer service representative, special events
17 coordinator, admissions representative, and auto paint repair specialist. Tr. 267,
18 292. Plaintiff reported she stopped working on November 1, 2008, because of her
19 condition. Tr. 266.

20 On November 3, 2010, Plaintiff was evaluated by Paul Emmans, D.O. Tr.
21 542-543. He opined that Plaintiff was limited to one to ten hours a week of work
22 activity and that this limitation was permanent. *Id.* On August 31, 2011, Dr.
23 Emmans provided a second opinion that Plaintiff was limited to one to ten hours a
24 week of work activity and that this limitation would persist for twelve to twenty-
25 four months. Tr. 539-540. On September 17, 2012, Dr. Emmans provided a third
26 opinion that Plaintiff was limited to one to ten hours a week of work stating that if
27 Plaintiff were able to have a consistent supply of medication then she does ok, but
28 without medication she quickly decompensates. Tr. 537. Dr. Emmans

1 characterized Plaintiff's limitation as permanent. Tr. 538.

2 On July 18, 2011, Jenifer Schultz, Ph.D., completed an Adult Memory
3 Assessment. Tr. 501-508. Dr. Schultz interview the Plaintiff, reviewed records
4 from Gabriela Mondragon, MSW, Dr. Emmans, and Kirk Stroshal, Ph.D.,
5 completed a mental status examination, a Wechsler Memory Scale-III test, and the
6 Trails A and B test. Tr. 501-502. Dr. Schultz then opined that Plaintiff's "ability
7 to understand and reason is poor currently. Her memory is extremely low except
8 for working memory, which is average. Her social interaction is limited to fellow
9 church members, but she receives support from them. Ms. Robeck's ability to
10 tolerate or adapt to stress is poor." Tr. 507.

11 On September 21, 2011, Beth Fitterer, Ph.D., reviewed the record and
12 opined that Plaintiff was capable of simple routine tasks, capable of adequate
13 concentration, persistence, and pace, should avoid the demands of the general
14 public, and was able to respond to routine workplace changes with a prolonged
15 period of adjustment. Tr. 132-135.

16 STANDARD OF REVIEW

17 The ALJ is responsible for determining credibility, resolving conflicts in
18 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
19 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law *de novo*,
20 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
21 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
22 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
23 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
24 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
25 another way, substantial evidence is such relevant evidence as a reasonable mind
26 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
27 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
28 interpretation, the court may not substitute its judgment for that of the ALJ.

1 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial
 2 evidence will be set aside if the proper legal standards were not applied in
 3 weighing the evidence and making the decision. *Browner v. Secretary of Health*
 4 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence
 5 supports the administrative findings, or if conflicting evidence supports a finding
 6 of either disability or non-disability, the ALJ's determination is conclusive.
 7 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

8 **SEQUENTIAL EVALUATION PROCESS**

9 The Commissioner has established a five-step sequential evaluation process
 10 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
 11 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
 12 through four, the burden of proof rests upon the claimant to establish a *prima facie*
 13 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
 14 burden is met once a claimant establishes that physical or mental impairments
 15 prevent her from engaging in her previous occupations. 20 C.F.R. §§
 16 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do her past relevant work, the
 17 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that
 18 (1) the claimant can make an adjustment to other work, and (2) specific jobs exist
 19 in the national economy which the claimant can perform. *Batson v. Comm'r of*
 20 *Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If the claimant cannot make
 21 an adjustment to other work in the national economy, a finding of "disabled" is
 22 made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

23 **ADMINISTRATIVE DECISION**

24 On February 1, 2013, the ALJ issued a decision finding Plaintiff was not
 25 disabled as defined in the Social Security Act.

26 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
 27 activity since November 1, 2008, the alleged date of onset. Tr. 27.

28 At step two, the ALJ determined Plaintiff had the following severe

1 impairments: depression, PTSD, and bipolar disorder. Tr. 28.

2 At step three, the ALJ found Plaintiff did not have an impairment or
3 combination of impairments that met or medically equaled the severity of a listed
4 impairment. Tr. 29.

5 At step four, the ALJ assessed Plaintiff's residual function capacity (RFC)
6 and determined she could perform a full range of light work with the following
7 additional limitations: "This individual is limited to simple tasks with simple
8 work-related decisions. She can only have occasional and superficial interaction
9 with public." Tr. 30. The ALJ concluded that Plaintiff was not able to perform her
10 past relevant work, which included the occupations of cashier II and
11 waitress/cocktail server. Tr. 34.

12 At step five, the ALJ considered Plaintiff's age, education, work experience,
13 RFC, and the testimony of the vocational expert. The ALJ found there were other
14 jobs that exist in significant numbers in the national economy Plaintiff could
15 perform, including housekeeper/cleaner, production assembler, and hand packer.
16 Tr. 34-35. The ALJ thus concluded Plaintiff was not under a disability within the
17 meaning of the Social Security Act at any time from November 1, 2008, the
18 alleged date of onset, through February 1, 2013, the date of the ALJ's decision. Tr.
19 35.

20 ISSUES

21 The question presented is whether substantial evidence supports the ALJ's
22 decision denying benefits and, if so, whether that decision is based on proper legal
23 standards. Plaintiff contends the ALJ erred by (1) failing to accord weight to the
24 opinions of treating and examining providers, and (2) failing to properly consider
25 Plaintiff's testimony about the severity of her symptoms.

26 DISCUSSION

27 A. Evaluation of Medical Evidence

28 Plaintiff argues the ALJ failed to properly consider and weigh the medical

1 opinions of Paul Emmans, D.O., Gabriela Mondragon, MSW, Shane Anderson,
2 Pharm. D., Jenifer Schults, Ph.D., and Beth Fitterer, Ph.D. ECF No. 15 at 10-21.

3 In weighing medical source opinions, the ALJ should distinguish between
4 three different types of physicians: (1) treating physicians, who actually treat the
5 claimant; (2) examining physicians, who examine but do not treat the claimant;
6 and, (3) nonexamining physicians who neither treat nor examine the claimant.
7 *Lester v Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
8 weight to the opinion of a treating physician than to the opinion of an examining
9 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). The ALJ should give
10 more weight to the opinion of an examining physician than to the opinion of a
11 nonexamining physician. *Id.*

12 When a treating physician's opinion is not contradicted by another
13 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
14 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
15 physician's opinion is contradicted by another physician, the ALJ is only required
16 to provide "specific and legitimate reasons" for rejecting the opinion. *Murray v.*
17 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when an examining
18 physician's opinion is not contradicted by another physician, the ALJ may reject
19 the opinion only for "clear and convincing" reasons. *Lester*, 81 F.2d at 830. When
20 an examining physician's opinion is contradicted by another physician, the ALJ is
21 only required to provide "specific and legitimate reasons" for rejecting the opinion
22 of the examining physician. *Id.* at 830-831.

23 **1. Paul Emmans, D.O.**

24 The ALJ gave Dr. Emmans' opinions "limited weight," because (1) he did
25 not mention Plaintiff's history of drug or alcohol abuse, and (2) he agreed that
26 Plaintiff's symptoms were controlled with medication. Tr. 33.

27 First, the ALJ's assertion that Dr. Emmans was not aware of Plaintiff's drug
28 use is not supported by substantial evidence. The report from the November 3,

1 2010, evaluation by Dr. Emmans specifically addressed Plaintiff's history of drug
2 and alcohol use. Tr. 422. Furthermore, it is unclear what relevance a history of
3 drug use would have on Dr. Emmans' opinions. Plaintiff consistently reported
4 abstaining from drug use since 2004 and there is no evidence showing that Plaintiff
5 was using drugs at the time of Dr. Emmans' opinions. Tr. 61, 422, 501.
6 Likewise, Plaintiff reported that she had not drank alcohol since October 2011, and
7 the use prior to that was limited to an occasional drink, but not drinking to
8 intoxication. Tr. 62. Thus, the ALJ's reason is not supported by substantial
9 evidence.

10 The ALJ's second assertion that Plaintiff's symptoms were controlled by
11 medication is not supported by substantial evidence. On October 22, 2012,
12 Plaintiff told Dr. Anderson that "I feel stable when I am on all my medications at
13 the same time." Tr. 564. On November 19, 2012, Plaintiff stated that the addition
14 of Seroquel "was extremely helpful." Tr. 601. Based on these statements, the ALJ
15 found that the "longitudinal record reflects that the claimant's mental symptoms
16 could be adequately controlled by medication." Tr. 32. A treating physician's
17 statements "must be read in context of the overall diagnostic picture he draws.
18 That a person who suffers from severe panic attacks, anxiety, and depression
19 makes some improvement does not mean that the person's impairments no longer
20 seriously affect her ability to function in a workplace." *Holohan v. Massanari*, 246
21 F.3d 1195, 1205 (9th Cir. 2001). Considering the nature of Plaintiff's mental
22 health impairments, these two statements made by Plaintiff within a month of each
23 other does not constitute a longitudinal record showing her symptoms were
24 controlled by medication.

25 Thus, the ALJ failed to provide specific and legitimate reasons supported by
26 substantial evidence to reject Dr. Emmans' opinions.

27 **2. Jennifer Schultz, Ph.D.**

28 The ALJ afforded "less weight" to the opinion of Dr. Schultz because (1)

1 Plaintiff had not accurately represented her functional activities to Dr. Schultz and
2 (2) Dr. Schultz considered the residual effects of Plaintiff's long-term substance
3 use. Tr. 31.

4 The ALJ's first reason for rejecting Dr. Schultz's opinion, that Plaintiff had
5 not accurately represented her functional activities during the evaluation, is not a
6 specific and legitimate reason. The ALJ quoted Plaintiff's reports to Dr. Schultz
7 that she relies on help from her children to complete housework and compared it to
8 Plaintiff's reports on a Function Report stating that she could do light
9 housekeeping but did not mention assistance from her children. Tr. 31. The ALJ
10 found these statements inconsistent indicating that Dr. Schultz relied upon
11 claimant's inaccurate statements in forming her opinion. Tr. 31.

12 If a provider's opinions are based "to a large extent" on a claimant's self-
13 reports and not on clinical evidence, and the ALJ finds the applicant not credible,
14 the ALJ may discount the provider's opinion. *Tommasetti v. Astrue*, 533 F.3d
15 1035, 1041 (9th Cir. 2008); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th
16 Cir. 2005). However, the ALJ must offer a basis, supported by substantial
17 evidence, for her conclusion that a provider's opinion was based more heavily on a
18 claimant's self-reports. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014).

19 Here, the decision is silent as to why the ALJ found that Dr. Schultz's
20 opinion was based on Plaintiff's inconsistent comments and not the objective
21 testing performed. Thus, this reason fails to meet the specific and legitimate
22 standard.

23 The ALJ's second reason for rejecting Dr. Schultz's opinion, that she
24 considered the residual effects of Plaintiff's long-term substance use, is also not a
25 specific and legitimate reason to reject her opinion. The ALJ fails to illustrate why
26 Dr. Schultz's consideration of the residual effect of Plaintiff's past drug use would
27 cause her opinion to be given less weight. Tr. 31. Plaintiff challenges this
28 rationale in her opening brief asserting it does not meet the specific and legitimate

1 standard and Defendant fails to address this challenge in her briefing. ECF No. 15
2 at 18-19; ECF No. 21 at 19-20. Seeing no challenge, the Court agrees this fails to
3 meet the specific and legitimate standard.

4 **3. Beth Fitterer, Ph.D.**

5 In contrast to the opinions by Dr. Emmans and Dr. Schultz, the ALJ gave
6 “significant weight,” to the opinion of Dr. Fitterer. Tr. 33. Dr. Fitterer never
7 examined Plaintiff and based her opinion on evidence reviewed in the record as of
8 September 21, 2011. Tr. 126-135. The opinion of a nonexamining physician
9 cannot by itself constitute substantial evidence that justifies the rejection of the
10 opinion of either an examining physician or a treating physician. *Pitzer v.*
11 *Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990); *Gallant v. Heckler*, 753 F.2d 1450,
12 1456 (9th Cir. 1984).

13 Here, the ALJ found that Dr. Fitterer’s opinion was consistent with the
14 totality of the medical records, including Plaintiff’s self-reported activities and the
15 opinions of Dr. Lyzanchuk and Dr. Simon. Tr. 33. This conclusion is not
16 supported by substantial evidence. All of the opinions of examining or treating
17 providers in the record gave Plaintiff much greater limitations: on October 27,
18 2009, Dr. Lyzanchuk opined that Plaintiff was limited to eleven to twenty hours of
19 work a week and that the limitation would last months, Tr. 548-549; on November
20 19, 2009, Ms. Mondragon opined that Plaintiff was limited to working eleven to
21 twenty hours a week and that these limitations would last eight to ten months, Tr.
22 546-547; on March 4, 2010, Dr. Simon limited Plaintiff to working eleven to
23 twenty hours a week adding that he expected the limitation to last three to six
24 months, Tr. 544-545; on November 3, 2010, Dr. Emmans limited Plaintiff to
25 working one to ten hours a week and that this limitation was permanent, Tr. 542-
26 543; on July 18, 2011, Dr. Schultz opined that Plaintiff’s “ability to understand and
27 reason is poor currently. Her memory is extremely low except for working
28 memory, which is average. Her social interaction is limited to fellow church

1 members, but she receives support from them. Ms. Robeck's ability to tolerate or
2 adapt to stress is poor," Tr. 507; on August 31, 2011, Dr. Emmans opined that
3 Plaintiff was limited to working one to ten hours a week and that this limitation
4 would persist for twelve to twenty-four months, Tr. 539-540; on September 17,
5 2012, Dr. Emmans opined that Plaintiff was limited to working one to ten hours a
6 week and that this limitation was permanent, Tr. 537-538; and on September 28,
7 2012, Ms. Mondragon opined that Plaintiff was limited to working one to ten hours
8 a week and that the limitation would last for twelve months. Tr. 533-535.
9 Therefore, Dr. Fitterer's opinion that Plaintiff is capable of sustaining work activity
10 is not consistent with the record as a whole.

11 The ALJ found Dr. Fitterer's opinion that Plaintiff was capable of sustaining
12 work activity was consistent with the opinions of Dr. Lyanchuk and Dr. Simon
13 because they did not opine that Plaintiff's limitations would be permanent. Tr. 33.
14 But, Social Security does not require that limitations be permanent. *See* 42 U.S.C.
15 §§ 423(d)(1)(A), 1382c(a)(3)(A) (an individual shall be considered disabled if she
16 has an impairment which can be expected to result in death or which has lasted or
17 can be expected to last for a continuous period of not less than 12 months). The
18 Court recognizes that Dr. Lyanchuk and Dr. Simon both opined that Plaintiff's
19 limitations would be short term, but subsequent opinions from Dr. Emmans and
20 Ms. Mondragon supports the conclusion that her limitations persisted beyond the
21 prescribed time. Therefore, Dr. Fitterer's opinion is not consistent with the
22 opinions of treating or examining providers or the record as a whole and does not
23 constitute substantial evidence to support the rejection of Plaintiff's treating and
24 examining providers.

25 The ALJ's rejection of Dr. Emmans' and Dr. Schultz's opinions constitutes
26 harmful error and the case must be remanded. Upon remand, the ALJ will
27 reconsider all opinions of all treating and examining providers, including Dr.
28 Anderson and Ms. Mondragon.

B. Credibility

Plaintiff contests the ALJ's adverse credibility determination in this case. ECF No. 15 at 21-24.

It is generally the province of the ALJ to make credibility determinations, *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester*, 81 F.3d at 834. "General findings are insufficient: rather the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

The ALJ found Plaintiff not fully credible concerning the intensity, persistence, and limiting effects of her symptoms. Tr. 30-31. The ALJ reasoned that Plaintiff was less than fully credible because (1) she had a poor work history, and (2) her self-reported activities indicated that she was capable of "light" exertional work. Tr. 31.

1. Poor Work History

The ALJ noted that for twelve years before the alleged date of onset, Plaintiff's earnings never reached substantial gainful activity, except for 2007. Tr. 31. Therefore, the ALJ found Plaintiff's poor earnings years showed that reasons other than medical conditions were preventing work. *Id.* Poor work history can provide a permissible reason to cast doubt on Plaintiff's purported reason for unemployment. *See Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

Plaintiff offers alternative explanations for Plaintiff's limited work history, including a history of mental illness and drug use and alludes to the argument that a lack of motivation is a symptom of Plaintiff's mental illness. ECF No. 15 at 21-22. While these other explanations may be reasonable if supported by substantial evidence, Plaintiff failed to cite any evidence in the record supporting the

1 conclusion that Plaintiff's limited work history was due to her mental illness
2 manifesting prior to the alleged date of onset or her history of drug use. *Id.* The
3 ALJ's interpretation of Plaintiff's limited work history as a lack of motivation to
4 work is reasonable. *See Tackett*, 180 F.3d at 1097 (if the evidence is susceptible to
5 more than one rational interpretation, the court may not substitute its judgment for
6 that of the ALJ). Therefore, this reason meets the specific, clear and convincing
7 standard.

8 **2. Self-Reported Activities**

9 The ALJ's second reason for finding Plaintiff less than fully credible, that
10 Plaintiff's "domestic activities" supports a conclusion that she is capable of
11 performing "light" work, Tr. 31, is not a specific, clear and convincing reason to
12 find Plaintiff less than fully credible.

13 A claimant's daily activities may support an adverse credibility finding if (1)
14 the claimant's activities contradict her other testimony, or (2) "the claimant is able
15 to spend a substantial part of [her] day engaged in pursuits involving performance
16 of physical functions that are transferable to a work setting." *Orn*, 495 F.3d at 639
17 (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). "The ALJ must make
18 'specific findings relating to [the daily] activities' and their transferability to
19 conclude that a claimant's daily activities warrant an adverse credibility
20 determination." *Id.* (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.
21 2005)). A claimant need not be "utterly incapacitated" to be eligible for benefits.
22 *Fair*, 885 F.2d at 603.

23 The ALJ noted that Plaintiff reported caring for her two children by helping
24 them with homework and getting them ready for school, caring for two pets by
25 cleaning the litter box, preparing simple meals daily for up to two hours, doing
26 light housekeeping for hours of time, driving a car, shopping at a store twice a
27 month, having family visit her at home, being able to sit for long periods of time,
28 and helping the volunteers from church revamp her mobile home. Tr. 31. The

1 ALJ found that these activities supported the conclusion that Plaintiff was capable
2 of a “light” residual functional capacity determination. *Id.*

3 The ALJ was required to make a determination as to the transferability of
4 these activities to the workplace under *Orn.* The ALJ failed to make such a
5 determination. *Id.* Therefore, this is not a specific, clear and convincing reason to
6 find Plaintiff less than fully credible. *See Fair v. Bowen*, 885 F.2d 597, 603 (9th
7 Cir. 1989) (“many home activities are not easily transferable to what may be the
8 more grueling environment of the workplace, where it might be impossible to
9 periodically rest or take medication”).

10 Additionally, the ALJ found that Plaintiff’s organized religious activities
11 were inconsistent with Plaintiff’s alleged “severe psychological limitations.” Tr.
12 31. This is not a specific, clear and convincing reason to discount credibility,
13 because it does not identify what activities impeach which of Plaintiff’s statements.
14 *See Lester*, 81 F.3d at 834 (“the ALJ must identify what testimony is not credible
15 and what evidence undermines the claimant’s complaints”).

16 Defendant alleges that the ALJ provided several additional reasons
17 supporting her adverse credibility determination including that Plaintiff’s
18 statements were inconsistent with the record as a whole, that Plaintiff made
19 inconsistent statements throughout the record, and Plaintiff was non-compliant
20 with treatment. ECF No. 21 at 9-15. These reasons are not clearly addressed as
21 part of the credibility determination made by the ALJ, but are dispersed throughout
22 the discussion of the opinion evidence. Tr. 31-32. Considering the ALJ’s lack of
23 clarity and that the case is being remanded on other issues, the ALJ is instructed to
24 readdress credibility on remand.

25 REMEDY

26 The decision whether to remand for further proceedings or reverse and
27 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
28 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate

1 where “no useful purpose would be served by further administrative proceedings,
 2 or where the record has been thoroughly developed,” *Varney v. Secretary of Health*
 3 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
 4 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280
 5 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
 6 (noting that a district court may abuse its discretion not to remand for benefits
 7 when all of these conditions are met). This policy is based on the “need to
 8 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are
 9 outstanding issues that must be resolved before a determination can be made, and it
 10 is not clear from the record that the ALJ would be required to find a claimant
 11 disabled if all the evidence were properly evaluated, remand is appropriate. *See*
 12 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
 13 F.3d 1172, 1179-80 (9th Cir. 2000).

14 In this case, it is not clear from the record that the ALJ would be required to
 15 find Plaintiff disabled if all the evidence were properly evaluated. Further
 16 proceedings are necessary for the ALJ to weight the opinions of treating and
 17 examining medical providers and determine Plaintiff’s credibility regarding her
 18 symptom reporting. In addition, the ALJ will also need to supplement the record,
 19 reconsider the medical evidence and take testimony from a medical expert and a
 20 vocational expert at a new hearing.

21 CONCLUSION

22 Accordingly, **IT IS ORDERED:**

- 23 1. Defendant’s Motion for Summary Judgment, **ECF No. 21**, is
 24 **DENIED**.
- 25 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 15**, is
 26 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
 27 additional proceedings consistent with this Order.
- 28 3. Application for attorney fees may be filed by separate motion.

1 The District Court Executive is directed to file this Order and provide a copy
2 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
3 and the file shall be **CLOSED**.

4 DATED March 7, 2016.



A handwritten signature in black ink, appearing to be "M", is written above a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE